

DISCLAIMER

This electronic version of an SCC order is for informational purposes only and is not an official document of the Commission. An official copy may be obtained from the [Clerk of the Commission, Document Control Center](#).

COMMONWEALTH OF VIRGINIA, ex rel.

STATE CORPORATION COMMISSION

v.

CASE NO. PUE980621

**NOCUTS, Inc.,
Defendant.**

REPORT OF HOWARD P. ANDERSON, JR., HEARING EXAMINER

June 22, 1999

On October 1, 1998, the State Corporation Commission ("Commission") issued a Rule to Show Cause ("Rule") alleging that NOCUTS, Inc. (the "Defendant" or "NOCUTS") violated the Underground Utility Damage Prevention Act. (Sections 56-265.14 et seq. of the Code of Virginia) (the "Act").

In its Answer of October 21, 1998, the Defendant admits that it failed to mark the location of the underground facility within forty-eight hours after receiving notice from the notification center. The Defendant denies, however, that the failure to mark the facility within the designated time caused the damage described in the Rule to Show Cause. The Defendant maintains that the damage occurred after the facility was marked, therefore the damage to the facility could not have been caused by its failure to mark the facilities within the time prescribed. (Answer at 2).

On November 13, 1998, Staff filed several motions including a Motion to Amend Rule to Show Cause. By Hearing Examiner's Rulings of November 24, 1998 and January 7, 1999, Staff's amendments were approved. As amended, the Rule to Show Cause alleges:

(1) NOCUTS, acting on behalf of Columbia Gas of Virginia, Inc., failed to mark the approximate horizontal location of the underground utility line located at or near 210 Church Street, Fredericksburg, Virginia, on the ground to within two feet of either side of the underground utility line in violation of Sections 56-265.19 A and D of the Code of Virginia;

(2) NOCUTS, acting on behalf of Columbia Gas of Virginia, Inc., failed to mark the underground gas line located at or near 210 Church Street, Fredericksburg, Virginia, within forty-eight hours after receiving notice from the notification center in violation of Sections 56-265.19 A and D of the Code of Virginia; and

(3) NOCUTS, acting on behalf of Columbia Gas of Virginia, Inc., failed to report whether the location of the underground utility lines located at 210 Church Street, Fredericksburg Virginia, was marked or clear to the notification center's excavator-operator information exchange system as required by Sections 56-265.19 A and D of the Code of Virginia.

The Defendant, in its Amended Answer of December 11, 1998, again admitted its failure to mark the facilities within the forty-eight hour time period, but denied that this failure led to the damage alleged.

On January 11, 1999, Staff filed a Motion for Summary Judgment as to Paragraph (3) of the Rule to Show Cause, contending that a trial court may enter summary judgment when no material fact is genuinely in dispute. Staff argues the Defendant had a specific duty to mark the facilities in question within forty-eight hours of notification and that it failed to comply with this duty.

On January 26, 1999, the Defendant filed a Response to Staff's Motion for Summary Judgment ("Response"), and its own Motion for Summary Judgment. In its Response, the Defendant maintained that, although it did not mark the facility within forty-eight hours, it did exercise reasonable care to comply with the time requirement. (Response at 1). The Defendant contended that the facts established so far in this proceeding support its position that it used reasonable care to attempt to mark the facilities within forty-eight hours. Therefore, the Defendant requested that Staff's Motion for Summary Judgment be denied and that summary judgment be granted the Defendant because Staff has failed to show that NOCUTS did not exercise reasonable care.

By Hearing Examiner's Ruling of February 25, 1999, both Motions for Summary Judgment were denied.

The hearing began on March 30, 1999, and lasted two and one-half days. Anthony Gambardella, Michael J. Quinan, and Elizabeth Niles appeared as counsel for NOCUTS. Sherry Bridewell and Philip R. de Haas appeared as counsel for Commission Staff. Briefs were filed on May 6, 1999. A transcript of the proceeding is filed with this Report.

SUMMARY OF THE HEARING RECORD

On March 28, 1996, Columbia Gas of Virginia ("Columbia") contracted with NOCUTS to serve as locator of Columbia's underground facilities. On May 11, 1998, at 7:32 a.m. William Knisley contacted One Number Information Systems, Inc, the notification center, with a request to have all utilities behind the house at 210 Church Street, Fredericksburg, Virginia, marked on the patio, around the air conditioner, and in a six-foot radius around the meter. (Tr. 86, 110). NOCUTS had forty-eight hours from this time to locate the utilities and report to the Ticket Information Exchange ("TIE"). The TIE system would then relay the information to the person making the request for utility location. At 5:30 p.m. on May 11, a courier picked up the ticket to mark 210 Church Street at NOCUTS' Richmond office and delivered it to NOCUTS' Fredericksburg drop box. The ticket was assigned to NOCUTS' locator Johnny Dean at 7:00 a.m. on May 12.

On May 12, at 3:11 p.m., NOCUTS' Richmond office left a message on Mr. Knisley's answering machine requesting an extension of time to mark the 210 Church Street address.¹ (Tr. 121-124). The notification center's excavator-operator TIE system was notified that an extension for 210 Church Street was requested.

On May 14, Johnny Dean, a NOCUTS locator with eleven years of experience, had approximately fifty to sixty tickets for location and was working twelve-hour days.² (Tr. 349). In the early afternoon of May 14, Mr. Dean spent eleven minutes locating and marking the gas, telephone, and cable television utilities at 210 Church Street.³ (Tr. 387). Mr. Dean called the NOCUTS' Richmond office to bill the ticket at 2:00 p.m. When NOCUTS' computer attempted to call the notification center's TIE system at 2:13 p.m. on May 14, to inform them the 210 Church Street location had been marked, it was locked out. The TIE system computers will not accept responses after seventy-two hours and fifteen minutes from the time of the initial request.⁴ In this instance, more than seventy-seven hours had elapsed.

On May 15, Mr. Knisley drove a ground rod into the ground at 210 Church Street, piercing Columbia's five-eighth inch plastic gas service line. (Tr. 615, 142; Ex. No. DS-6). On May 16, at 7:18 a.m. (Tr. 218), a gas explosion occurred at the 210 Church Street location, reducing the house to rubble. (Tr. 426; Ex. No. DS-4). Mr. Knisley, the excavator, was injured in the explosion and subsequently died from his injuries.

APPLICABLE LAW

Staff alleges Defendant violated Sections 56-265.19 A and D of the Code of Virginia which state:

- A. If a proposed excavation or demolition is planned in such proximity to the underground utility line that the utility line may be destroyed, damaged, dislocated, or disturbed, the operator shall mark the approximate horizontal location of the underground utility line on the ground to within two feet of either side of the underground utility line by means of stakes, paint, or flags no later than forty-eight hours after receiving notice from the notification center and shall report no later than forty-eight hours that the location of the lines has been marked to the notification center's excavator-operator information exchange system. If the operator is unable to mark the location within seventy-two hours

¹Pamela Anderson, an employee of NOCUTS at the time of the accident, called Mr. Knisley to request a twenty-four hour extension. Unable to reach him, she left a message on his voice mail requesting the extension. There was no further contact with Mr. Knisley, therefore, it is unknown if he received the message or agreed to the requested extension. (Tr. 123, 124).

²A normal day in a similar work area would consist of twenty to thirty tickets. (Tr. 350, 567).

³Although Mr. Knisley only requested the utilities to be marked in a six-foot radius around the meter, Mr. Dean did not limit his markings to this area. (Tr. 439).

⁴The fifteen minutes is a grace period. (Tr. 90).

due to extraordinary circumstances, the operator shall notify directly the person who proposes to excavate or demolish and shall, in addition, notify the person of the date and time when the location will be marked. Such notification of inability to mark location shall be within seventy-two hours from the original notification, and the deferral to mark for extraordinary circumstances shall be no longer than ninety-six hours, unless a longer time is otherwise agreed upon by the operator and excavator. The operator shall also inform the notification center of any deferral.

- D. Any contract locator acting on behalf of an operator and failing to perform the duties imposed by this chapter shall be subject to the liabilities in Section 56-265.25 and the civil penalties in Section 56-265.32.

The penalty provisions are found in Section 56-265.32 of the Code of Virginia and provide, “[t]he Commission may . . . impose a civil penalty not exceeding \$2,500 for each violation, if it is proved that the person violated any of the provisions of this chapter . . . as a result of a failure to exercise reasonable care.”

The Virginia Supreme Court has recognized that “reasonable care” “is a relative term, and varies with the nature and character of the situation to which it is applied. The amount or degree of diligence and caution which is necessary to constitute reasonable or ordinary care depends upon the circumstances and the particular surroundings of each specific case.” *Perlin v. Chappell*, 198 Va. 861, 864 (1957).

DISCUSSION

There are several factors, both direct and indirect, which contributed to this accident. The direct cause of the accident was the failure of NOCUTS’ locator, Johnny Dean, to correctly mark the gas service line. (Tr. 418). In fact, while the service line came straight out from the meter and went to the left, Mr. Dean marked it to the right in the backyard of 210 Church Street. (*Id.* 418). There are several questions regarding the indirect causes of this accident. Did NOCUTS use reasonable care in performing its underground utility location work? Did NOCUTS provide adequate staffing to perform its locator work? Finally, did NOCUTS provide adequate training to its locators?

To begin a review of this accident, it is important to look at the terms of NOCUTS’⁵ contract with Columbia. Pursuant to this contract, NOCUTS is compensated solely on the number of location tickets received and completed. (Tr. 450). In addition, under the terms of the contract, if NOCUTS cannot meet the scheduling requirements for the proposed work, Columbia can award a portion of the work to other contractors as necessary to complete the work. (Tr. 310, 463). Of course, NOCUTS would not be compensated for locate work performed by a subcontractor hired by Columbia to assist NOCUTS. (Tr. 310, 311, 464). The contract requires NOCUTS to provide

⁵At the time the contract was entered into, NOCUTS went by the name NC Utility Services. (Tr. 304).

sufficient staff, office and field equipment, transportation and supplies to fulfill its duties under the contract. (Ex. MD-13; Tr. 453).

Adequate Personnel

During the week of the accident, two NOCUTS locators in the Fredericksburg area left the company without notice.⁶ (Tr. 570). However, indications are that NOCUTS had been understaffed for some time. Mr. Dean, a NOCUTS locator, testified to carrying a heavy work load for most of 1998. (Tr. 350, 351). Mr. Dean's work load consisted of as many as 50 to 60 tickets a day and he was working approximately twelve-hour days. (Tr. 348, 349). George Russell, the operations field manager for NOCUTS' Richmond Division, testified that NOCUTS did not fill the vacant locator positions until July or August of 1998. NOCUTS did not hire a subcontractor to assist in its work until August or September of 1998. (Tr. 571).

Robert Worthy, former TIE administrator for the notification center, testified that NOCUTS requested extensions⁷ more frequently than other contract locators with which he was familiar. (Tr. 99). Mr. Worthy estimated that NOCUTS requested extensions at least 50% of the time. (Tr. 100). Pamela Anderson, a temporary employee for NOCUTS, explained that her sole job was to request extensions.⁸ (Tr. 119). Cathy Ruppe worked for NOCUTS for approximately three years, ending her employment with them on January 15, 1999. Beginning in November of 1996, her job was to call for extensions. Ms. Ruppe would make one hundred or more requests for extensions daily. (Tr. 113).

At the time of the incident, NOCUTS was experiencing a high volume of tickets. (Tr. 123). Yet, rather than notifying Columbia of this situation or requesting Columbia's help,⁹ NOCUTS simply increased the work load of its remaining locators and regularly requested extensions. Further, the volume of tickets alone can be misleading because some tickets require more time to complete than others. (Tr. 538). Although it may be difficult for NOCUTS to anticipate its work load, the consistent history of requests for extensions clearly indicates a chronic shortage of personnel.

⁶At the time of the incident, NOCUTS employed ten locators in the Fredericksburg area. When the two locators left without notice, NOCUTS had a total of eight locators to cover the area within a thirty-mile radius of Fredericksburg.

⁷Section 56-265.19 of the Code of Virginia requires the operator of a utility to mark the location of the underground utility line within forty-eight hours of notification. The locator may request extensions of this time limit if the delay is due to extraordinary circumstances. Extraordinary circumstances means floods, snow, ice storms, tornadoes, earthquakes, or other natural disasters. (§ 56-265.15 of the Code of Virginia).

⁸ Ms. Anderson worked for NOCUTS for approximately thirteen months, ending her employment on January 6, 1999. (Tr. 119).

⁹ Norman Duren, manager of compliance for Columbia, testified that, to his knowledge, NOCUTS did not make any request for assistance during this time period. (Tr. 309).

Training

NOCUTS trains its new locators for one week in a classroom. The new employee is then placed with an experienced locator for a period of three to five weeks. Finally, for a period of two weeks, the new locator is given simple tickets for location and reviews are done on the markings at that time. If performance is satisfactory, the locator is assigned a general area of responsibility. (Tr. 558, 559). If a locator has problems, he is scheduled for retraining or refresher training. Otherwise, NOCUTS has no annual training program. It does conduct monthly safety meetings.

NOCUTS' training manual requires its locators to mark within the time prescribed by state law. In Virginia, that time is forty-eight hours from notification by the notification center.¹⁰ The manual also instructs NOCUTS' locators to use the maps and drawings from utilities to obtain what is deemed "an enormous quantity of information about the presence and position of buried pipes and cables." (Ex. No. GR-18, at 3; Tr. 470). Service cards are part of the utility records locators should use if the locator is having trouble identifying the facility. (Tr. 476). The NOCUTS' training manual further directs its locators to "verify, not assume." (Ex. No. GR-18, Section 1: Overview at 3).

Mr. Dean testified that NOCUTS provided a three-week training period when he began work with the company followed by a quality control period. (Tr. 440). Other than monthly safety meetings, Mr. Dean has received no further training. (Tr. 473). The current training manual, developed in 1995 and implemented in 1996, states that utility records are "excellent sources in determining how each particular locate will be approached." (Tr. 481). George Russell, Mr. Dean's supervisor, testified that this training manual was designed for new employees hired after 1995. To the best of his knowledge, Mr. Dean has never seen this training manual.¹¹ (Tr. 486).

Service Head Adapter

James Hottinger, senior utilities engineer for the Commission's Division of Energy Regulation, arrived at 210 Church Street at 10:00 a.m. on May 16, the morning of the accident. While at the scene, Mr. Hottinger observed the gas service riser depicted in Exhibit Number DS-7. He explained that the presence of a service head adapter located above ground on gas service lines is a clear indication that the gas line is made of plastic. Pipeline safety regulations do not allow plastic lines to be exposed above ground because of deterioration, therefore the plastic service line must be inserted in a steel sleeve. The steel sleeve covering the plastic service line at 210 Church Street was approximately seven feet in length, including the riser. (Tr. 616). The service head adapter is located on the riser and is a compression coupling used to seal the plastic pipe and connect it to the steel sleeve. The service head adapter is clearly visible on the service at 210 Church Street (Photograph DS-7) and should have been a clear signal that this was a plastic service line.¹² (Tr. 611-613).

¹⁰Section 56-265.19 of the Code of Virginia.

¹¹Mr. Dean later verified he had never seen this training manual. (Tr. 584).

¹²Dale Knicely testified that an experienced locator would be able to identify a service head adapter, and therefore a plastic service, most of the time. (Tr. 260).

Tracer Wire

It was discovered after the accident that the tracer wire, which is used for locating purposes with all plastic lines, did not extend above the ground. (Tr. 549). Instead, the tracer wire was attached to the service line approximately twelve inches below ground. (Tr. 620, 633, 268). Apparently, the tracer wire was improperly installed, leading Mr. Dean to believe the service at 210 Church Street was steel.¹³ Therefore, Mr. Dean did not have direct access to the tracer wire to conduct his location of the underground utilities.

If, however, NOCUTS had had a company policy requiring its locators to obtain copies of Columbia's service cards¹⁴ and if NOCUTS had trained Mr. Dean to identify a service head adapter, the mistake as to the type of service line would have been avoided.

Service Cards

Mr. Dean used a MetroTech 810 locator to mark the television, gas, and telephone services at 210 Church Street. He was trained to accept a signal strength of 600 or above.¹⁵ (Tr. 411, 636). If the signal strength is below 600, Mr. Dean stated he is to question it and resort to other methods of location. (Tr. 636). This would include obtaining a copy of the applicable service card from Columbia's local office. Mr. Dean confirmed that NOCUTS does not require locators to obtain service cards prior to locating underground utilities. Mr. Dean stated he would have requested help from Columbia or referred to the service card for 210 Church Street if his signal had been below 600. The service cards are available at Columbia's local office approximately four to five miles from the scene of the accident. (Tr. 414, 415). Mr. Dean carries maps of Columbia's gas mains in his truck, but not maps of the service lines. (Tr. 416, 435).

Dale Knicely, a Columbia line locator with approximately nine years' experience, testified that he was trained to obtain a copy of the service card before attempting to locate any underground facility. (Tr. 258). Mr. Knicely explained that the service card contains good information about the service line to be located. Arriving at 210 Church Street between 9 and 10 a.m. on the morning of the accident, Mr. Knicely also used a Metrotech 810 to locate the gas service line. Mr. Knicely stated that, from the back of the house, he got a strong signal for about six feet. Then, however, the signal bled off to a cable TV line tracking to the right. (Tr. 262). By referring to the service card, Mr. Knicely realized the gas service line ran to the left. Hand digging confirmed the location of the gas service line. Mr. Knicely further acknowledges that the utilities in the backyard of 210 Church Street were fairly difficult to locate. (Tr. 283).

¹³ Allen Edge, operations manager of locating facilities for NOCUTS, testified that in his experience, if the service has a steel riser with no visible tracer wire, after eliminating other utilities, they conclude the service is steel. (Tr. 630).

¹⁴ Columbia's service cards are available at Columbia's local office. The service card has a diagram of the service line and whether the service line is steel or plastic. The service card is made when the service is installed.

¹⁵ Mr. Dean's signal was between 620 and 630. (Tr. 377).

Although Columbia's service cards and other records are available to NOCUTS' locators, they are not required, by contract or otherwise, to obtain service cards from the Columbia local office prior to locating underground gas lines. (Tr. 336, 337, 338). If Johnny Dean had obtained a copy of Columbia's service card for 210 Church Street, he would have known the service was plastic and the exact location and direction of the service line. (Ex. Nos. WP-8, WP-9). In short, Mr. Dean would have known he was incorrectly marking the gas service line. (Tr. 420). Instead, Mr. Dean spent a total of eleven minutes incorrectly locating the utilities at 210 Church Street.

Statutory Time Requirements

The Rule to Show Cause alleges NOCUTS failed to mark the underground utilities at 210 Church Street within the forty-eight hour limit imposed by statute.¹⁶ The statute further provides for extensions based on extraordinary circumstances such as flood, snow, ice storms, tornadoes, earthquakes or other natural disasters. However, NOCUTS made a request to Mr. Knisley for an extension simply to gain more time and notified the TIE system of its request. By the time Mr. Dean marked the utilities at 210 Church Street on the afternoon of May 14, the seventy-two hour time limit had expired, and NOCUTS was locked out of the TIE system.

It should also be noted that Mr. Dean did not receive the ticket to locate underground utilities at 210 Church Street until twenty-four hours of the forty-eight hour statutory time limit had elapsed. (Tr. 526). NOCUTS did not have a real time dispatch system in place which would have allowed its locators in the field to have immediate access to the ticket information. (Tr. 562, 563).

NOCUTS argues that, since Mr. Knisley did not drive the ground rod through the gas service line until after the utilities had been marked, its failure to mark within the required time is not a cause of the accident. Further, NOCUTS argues that its failure to comply with the time limits does not constitute a failure to exercise reasonable care as required by Section 56-265.32 of the Code of Virginia.

NOCUTS' argument that its failure to mark the utilities at 210 Church Street within the statutory time frame does not constitute a lack of reasonable care is not persuasive. All of the reasons Mr. Dean did not mark the utilities within the prescribed forty-eight hours point to a lack of reasonable care by NOCUTS. First, NOCUTS did not have adequate personnel to meet its work load. As noted previously, this shortage of personnel extends far beyond the unexpected loss of two locators. During 1998, Mr. Dean was working twelve-hour days and carrying twice the normal number of tickets for location. Further, NOCUTS' frequent reliance on statutorily questionable extensions is also clear evidence of inadequate personnel. NOCUTS' failure to address this problem or to request assistance from Columbia constitutes a lack of reasonable care.

Second, Johnny Dean's lack of training also shows a lack of reasonable care by NOCUTS. Mr. Dean had not even seen NOCUTS' current training manual. With proper training, Mr. Dean should have identified the service head adapter indicating a plastic service line.

¹⁶Section 56-265.19 of the Code of Virginia.

Third, if NOCUTS had had a policy requiring its locators to obtain a copy of the applicable service card, Mr. Dean would have known the exact location of the service line and that the service line was plastic. This, however, would have required additional time which would have conflicted with NOCUTS' practice to complete as many tickets as possible with a minimum of personnel.

NOCUTS failed to mark the utilities at 210 Church Street within the statutory time frame because it had inadequate personnel and it failed to seek assistance with its work load. These failures constitute a lack of reasonable care that, in this instance, had fatal consequences.

Based on the evidence presented in this case, I find that:

(1) NOCUTS failed to mark the location of the underground gas line located at 210 Church Street, Fredericksburg, Virginia, within the time required by Section 56-265.19 of the Code of Virginia;

(2) NOCUTS failed to mark within two feet of either side of the location of the underground gas line at 210 Church Street, Fredericksburg, Virginia, as required by Section 56-265.19 of the Code of Virginia;

(3) NOCUTS failed to report no later than forty-eight hours to the notification center's excavator-operator information exchange system that the location of the utilities at 210 Church Street had been marked;

(4) Pursuant to Section 56-265.32 of the Code of Virginia, NOCUTS should be assessed a civil penalty of \$2,500 for each violation, for a total of \$7,500; and

(5) Pursuant to Rule 20 VAC 5-309-50 B of the Commission's Rules for Enforcement of the Underground Utility Damage Prevention Act, the Commission should order NOCUTS to:

- a. Provide adequate training to its locators,
- b. Develop and follow a contingency plan to manage work load fluctuations, and
- c. Use utility company records that will assist in locating underground utilities.

I therefore **RECOMMEND** the Commission enter an order that:

1. **ADOPTS** the findings contained herein, and
2. **DISMISSES** this case from the Commission's docket of active cases.

COMMENTS

The parties are advised that any comments (Section 12.1-31 of the Code of Virginia and Commission Rule 5:16(e)) to this Report must be filed with the Clerk of the Commission in writing, in an original and fifteen (15) copies, within fifteen (15) days from the date hereof. The mailing address to which any such filing must be sent is Document Control Center, P. O. Box 2118,

Richmond, Virginia 23218. Any party filing such comments shall attach a certificate to the foot of such document certifying that copies have been mailed or delivered to all other counsel of record and to any party not represented by counsel.

Respectfully submitted,

Howard P. Anderson, Jr.
Hearing Examiner